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No.

Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

GUERINO RUSSO,
Petitioner,

VS.

UNITED STATES of AMERICA.

On Writ of Certiorari
to the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Parole Commission not to follow its own regulations—regulations that require that a prisoner who contests the facts upon which his parole range is based be granted a hearing—is a negligent act for which the United States may be sued under the Federal Tort Claims Act rather than a "discretionary function" under 28 U.S.C. section 2680, for which the United States is immune from suit.

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No.

In the Supreme Court

OF THE

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OCTOBER TERM, 1987

GUERINO RUSSO,
Petitioner,

VS.

UNITED STATES of AMERICA.

On Writ of Certiorari
to the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Guerino Russo, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Ninth Circuit entered in the above-entitled case on July 22, 1987, for which rehearing was denied on September 25, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit is not reported. It is printed in Appendix A *infra.*, at page A-1. The judgment of the United States District Court is printed in Appendix B *infra.*, at page A-4.

JURISDICTION

The judgment of the United States Court of Appeal for the Ninth Circuit (Appendix A) was entered on July 22, 1987. A timely petition for rehearing was denied on September 25, 1987 (Appendix C, *infra.*, at page A-5.) The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves sections 2674 and 2680(a) of 28 U.S.C., which respectively provide as follows:

> Liability of the United States. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or punitive damages.
>
> Exceptions. The provisions of this chapter and section 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of any employee of the Government, exercising due care in the execution of statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

This case also involves one of the Parole Board Regulations, 28 C.F.R. 2.19(c) which provides:

> (c) The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the

extent that it represents the explanation of the facts that best accords with reason and probability. . .

STATEMENT OF THE CASE

Guerino Russo is a former federal prisoner whose parole was delayed for two years when the Parole Board refused to allow him a hearing to challenge the facts on which his parole range was based—a hearing to which he was entitled under the Parole Board's own regulations. Russo brought this action against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. sections 2670-2680 for damages for the Parole Board's failure to follow the dictates of its own regulations. The court had federal jurisdiction under 28 U.S.C. section 2674.

The action—and inaction—of the Parole Board

Russo was convicted in the United States District Court for the Northern District of California of receiving stolen property and conspiracy to receive stolen property. On September 12, 1980, he was sentenced to seven years imprisonment which he began serving on October 31, 1980. The Parole Commission initially denied Russo parole in March of 1981 and his parole relief guidelines were fixed at 24 to 36 months, a range based on an offense severity of "very high", because Russo was found to have been involved in the theft of government property valued at over one hundred thousand dollars ($100,000). Russo disputed the high valuation of his thefts at that time and at all times thereafter.

On April 4, 1980, the Parole Commission determined that Russo should serve "to the continuation of his term" (two-thirds of his sentence) which gave him a parole date of February 28, 1985. That decision, like the previous evaluation, was based upon the high value placed on the merchandise which Russo had stolen. Russo appealed, challenging the evidence that he had committed a theft of over one hundred thousand dollars ($100,000), but the decision was affirmed on August 31, 1983. Thereafter, Russo submitted a number of petitions to the Parole Commission requesting a hearing pursuant to the provisions of 28 C.F.R. 2.19 and 2.28(a), claiming that the Commission had

relied upon a grossly inaccurate evaluation of the stolen goods; all of these petitions were denied.

Finally, on February 10, 1984, Russo petitioned the court for a writ of habeus corpus on the grounds that he was being illegally detained as a result of the Commission's refusal to follow its own rules and grant him a hearing. Before the Commission responded to the petition, it suddenly reversed its prior decisions and granted Russo a hearing. At this special hearing on May 3, 1984, Russo submitted evidence in the form of United States Navy records which established conclusively that the total amount of the thefts did not exceed seven thousand four hundred dollars ($7400).

The parole examiners concluded that the value of the stolen merchandise did not exceed seven thousand four hundred dollars ($7400) and that under the circumstances, a parole range of fourteen (14) to eighteen (18) months before release had been warranted, rather than the twenty-four (24) to twenty-six (26) months previously established. Since Russo had already been in custody for forty-two (42) months, the parole examiners ordered him released forthwith. Russo was paroled on May 11, 1984.

Russo's action

Russo filed a complaint under the FTCA against the United States on February 19, 1986, asking for damages for the Parole Board's failure to permit him a hearing to present his evidence until two years after he had requested it. He alleged that the Parole Commission's refusal to follow its own regulations was negligence per se. (He also initially alleged false imprisonment.) See amended complaint at Appendix E hereto, page A-8.

The United States moved to dismiss or, in the alternative, for summary judgment, claiming, among other arguments, that the Parole Commission was performing a discretionary function in handling Russo's parole matters and that the government is immune from liability for claims based on discretionary acts under 28 U.S.C. section 2680(a).

After a hearing on the motion, the court granted the defendant's motion for summary judgment and entering judgment on August 18, 1986 on the grounds that the decision of whether or

not to grant a hearing to Russo was a discretionary function under 28 U.S.C. section 2680(a). (Appendix B, page A-4) Russo timely noticed appeal to the United States Court of Appeal for the Ninth Circuit to review the grant of summary judgment. It was argued and submitted on May 13, 1987. A memorandum decision issued on July 22, 1987, affirming the decision below. (Appendix A, page A-1) Russo timely petitioned for rehearing, but the petition was denied on September 25, 1987. (Appendix C, page A-5)

REASONS FOR GRANTING WRIT

I

THE WRIT SHOULD BE GRANTED AS IMPORTANT QUESTIONS OF FEDERAL STATUTORY LAW ARE PRESENTED WHICH HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT

The issue in this case is whether the "discretionary function" exemption of the Federal Tort Claims Act is broad enough to insulate the government from suit when its employees fail to follow the dictates of their own, mandatory regulations.

The Federal Tort Claims Act permits suits against the government for employee negligence but specifically excepts suits where employees were engaged in discretionary acts. 28 U.S.C. 2680(a). The question of what is, and what is not, a discretionary act is obviously essential in interpreting the FTCA, as an extremely broad interpretation would swallow the Act, while a narrow interpretation might chisel the exemption away to nothing.

Although this Court has heard and decided various cases calling for an interpretation of the provisions of 28 U.S.C. 2680(a), it has never addressed the important issue presented here: Does the exemption apply where the governmental discretion claimed is the decision not to follow mandatory regulations? We submit that the FTCA should be interpreted to permit suit against the government for such blatant negligence in order to carry out the intent of Congress in enacting the Act.

This Court recently addressed the discretionary function exemption in *United States v. S.A. Empressa de Viacap Aerea Rio Grandense* (*"Varig"*) 467 U.S. 797 (1984). The Court characterized the exception as "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id* at 808.

The inquiry in the present case is whether the activities sought to be protected include agency refusal to follow mandatory regulations. *Varig* did not approach this issue, but, rather, held that the United States was not liable for the negligence of the Federal Aviation Administration (FAA) in certifying certain aircraft for use in commercial aviation. The Court also provided some guidelines for the "discretionary function" question. It directed that, in considering the reach of the discretionary function exemption, the nature of the conduct rather than the status of the actor governs. Secondly, it provided that Congress' reasons for enacting the provision must be upheld: the desire to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy. *Id.* at 814. The Court looked to the language in *Dalehite v. United States* 346 U.S. 15 (1953) for that distinction.

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. Where there is room for policy judgment and decision, there is room for discretion. 467 U.S. at 812 quoting 364 U.S. at 35-36

While it was unnecessary at the time of these decisions to define the boundaries of "discretion", we submit that, post-*Varig*, the question has become critical. The present case—involving agency refusal to follow mandatory regulations—is certainly at the farthest edge of imaginable boundaries, and absent consideration by this Court, those boundaries will likely continue to differ significantly from Circuit to Circuit.

We believe that in no Circuit should blatant refusal to follow mandatory regulations be protected and insulated from suit by the FTCA exceptions; however, we further submit that uniformity of the boundaries of "discretionary function" is even more essential. If a person in the West is permitted to sue the United States for an agency's refusal to follow its own mandatory regulations, it is inequitable and contrary to Congressional intent for a person in the East not to enjoy that same right. Whatever "discretion" means for the purposes of 28 U.S.C. 2680(a), it must have common boundaries throughout the nation. As the FTCA is the only method by which individuals can bring suit against the United States for negligence, the breadth to be accorded the "discretionary function" exemption is a critical one which should be determined by this Court.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS

Russo has claimed below and claims here that the Parole Commission's failure to follow its own rules was negligence per se, actionable under the FTCA. The question before the Ninth Circuit was the same as that before the Municipal Court below: Was the Parole Commission's refusal to follow its regulations and grant Russo a hearing a "discretionary" decision for the purposes of the FTCA exemption as a matter of law? This is not only an important question of federal law which should be addressed by this Court, but such review is essential since, after this Court's decision in *Varig, supra,* the question of the breadth to be accorded the "discretionary function" FTCA exemption has been addressed anew and answered differently by the different Circuits.

The general distinction that was drawn, pre-*Varig,* immunized the government for decisions at the "planning" level, yet permitted suits when the discretion involved was at the "operational" level. After the *Varig* decision, some courts (e.g., the Ninth Circuit) have eliminated this distinction, interpreting the "discretionary function" exemption very broadly and thus eliminating

many, if not most, lawsuits against governmental agencies. See, for example, *Begay v. United States,* 768 F.2d 1059 (9th Cir. 1985); *Wiggins v. U.S.* 799 F.2d 962 (5th Cir. 1986); *Heller v. United States* 803 F.2d 1558 (11th Cir. 1986). Other Circuits retain the operational/planning distinction or otherwise narrow the swath of the exemption in order to prevent it from swallowing up the entire FTCA. *Alabama Electric Cooperative v. United States* 769 F.2d 1523 (11th Cir. 1985); *Estate of Callas v. United States* 682 F.2d 613 (7th Cir. 1982); *Aslakson v. United States* 790 F.2d 688 (8th Cir. 1986); *United States Fire Ins. Co. v. United States* 806 F.2d 1529 (11th Cir. 1986).

The Circuits, and even courts within the same Circuit, are likewise divided on whether an agency's failure to follow the mandate of its own regulations constitutes the "discretion" necessary to invoke 28 U.S.C. 2680(a). Some Circuits are adamant that such an action cannot be a "discretionary function." *Loge v. United States* 662 F.2d 1268 (8th Cir. 1981), *cert. denied* 456 U.S. 944 (1982); *Griffin v. United States* 500 F.2d 1059 (3rd Cir. 1974); *Chotin Transportation, Inc. v. United States* 819 F.2d 1342 (6th Cir. 1987. Others are less certain. *Baker v. United States* 817 F.2d 560 (9th Cir. 1987); *Bacon v. United States* 810 F.2d 827 (8th Cir. 1987); *Gray v. Bell* F.2d 490 (D.C. Cir. 1983) *cert. denied* 465 U.S. 1100.

While perhaps the courts will never be uniform in distinguishing "discretion" for the purposes of the FTCA, it seems clear that some parameters should be in place. We submit that one such parameter should be that where a statute or regulation establishes a mandatory agency duty and the agency chooses not to carry out that obligation, the discretionary function exception of 28 U.S.C. 2680 (a) does not bar suit under the FTCA.

It seems particularly important to allow suit for failure to follow a mandatory regulation when the regulation is part of a readily ascertaintable rule or standard, enacted especially to provide uniformity in a particular area. See: *Hendry v. United States* 418 F.2d 774 (2nd Cir. 1969); *Meyers & Meyers Inc. v. United States Postal Service* 527 F.2d 1252 (2nd Cir. 1975); *Fair v. United States* 324 F.2d 288 (5th Cir. 1956); *Baltimore Federal v. United*

States 138 F.Supp. 639 (D.Md. 1956); *Hoffman v. United States* 398 F.Supp. 530 (ED.Mich. 1975).

In the present action, Petitioner Russo charges that the Parole Commission violated the dictates of 28 C.F.R. 2.19, which requires that the Commission determine "by a preponderance of the evidence" factual disputes a prisoner brings to its attention. This regulation thus requires that the prisoner be given an opportunity to be heard and to present evidence—in short, it requires that the prisoner be afforded a hearing.

The Parole Release Guidelines set out in the regulations were intended by Congress to make parole decisions fairer, more certain and consistent, and to reduce the disparity of time served in incarceration that resulted from varying sentences by district judges for offenses involving similar circumstances. *Warren v. U.S. Parole Commission* 659 F.2d 183 (9th Cir. 1977). Congress specifically required the Commission to meet at least quarterly and to promulgate regulations to carry out a national parole policy. 18 U.S.C. 4203(a).

The guidelines themselves take the form of a "grid" in which one variable represents the severity of the offense for which sentence was imposed; the guideline table lists a number of specific offenses in each category from "low" to "greatest" severity. The second variable, termed the "salient factors score", is based on six factors: number of prior convictions, prior incarcerations; age of first commitment; parole and probation history; employment history; history of heroin or opium dependence; whether the offense involved auto theft or checks.

The courts have not been reluctant to enforce the parole guideline regulations. It has been repeatedly ruled that once the Commission develops guidelines to measure parole risk, it must either follow them or change them. *Briggs v. U.S. Parole Commission* 736 F.2d 447 at 450, (8th Cir. 1984). The courts have required the parole board to follow its own regulations in setting forth reasons for deviating from parole guidelines [*Bowman v. U.S. Board of Parole* 441 F.Supp. 329 (W.D.Wis. 1976)] and have found that failure to follow its regulations constitutes a violation of the prisoner's due process rights. *Hearn v. Nelson* 496

F.Supp. 1111 (D.Conn. 1980); *Allen v. Hadden* 536 F.Supp. 586 (D.Colo. 1982).

In this major respect, the federal guidelines differ from many state parole systems. Thus the U.S. Supreme Court's rulings that a prisoner has no due process rights in a state parole system [e.g. *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex* 442 U.S. 1 (1979)] do not apply to the new, uniform federal system. As the court stated in *Allen v. Hadden, supra* at 592, "because the detailed statutory and regulatory procedures of the federal parole system provide more than a 'mere hope', the *Greenholtz* decision is not directly applicable." Rather, the federal system was intended by Congress to provide a uniformity of application and does provide a sufficiently objective standard to give the prisoner due process rights.

We submit that the Parole Commission's failure to follow its own guidelines in Russo's case did not involve the type of discretion contemplated by Congress in drafting the FTCA, and thus is actionable negligence. The Parole Guidelines, including the procedural safeguards, were guidelines intended by Congress and the Parole Commission to direct the actions and decisions of the parole examiners. While there might be another, specific segment of the parole examiners' duties that require discretion in planning or policy, we submit that the decision whether to follow a mandatory regulation was not one; the parole examiners in this case were simply charged with the discretion to carry out the policies already promulgated on a national level.

III

PETITIONER RUSSO PROPERLY RAISED THESE ISSUES BELOW

In the memorandum decision of the Ninth Circuit, the Court indicated by footnote (footnote 2, page 1, Appendix A) that Russo's counsel raised, during oral argument, the issue of whether the Commission failed to fulfill a nondiscretionary duty under 28 C.F.R. 2.19 to resolve Russo's dispute by the preponderance of the evidence standard. After noting the issue, the court declined to address it, saying:

> After reviewing the court, we conclude that Russo did not present this theory in district court, and we accordingly decline to address it. [cite omitted]

Contrary to the court's conclusion, Russo submits that he in fact did address the issue in district court. That he addressed the issue from the very beginning in district court is evidenced by his first amended complaint, attached hereto in Appendix E. At page 4 of that complaint, lines 1-8, Russo stated:

> 9. The rules and regulations established by the United States Parole Commission, including 28 C.F.R. 2.19, were promulgated for the protection of those persons incarcerated in the Federal Correctional Facilities, including plaintiff herein. In particular, 28 C.F.R. 2.19 was and in intended to prohibit the Parole Commission from denying parole based upon information which is disputed by a prisoner *unless said prisoner is allowed to respond to the dispute information and the accuracy of the information relied upon by the Parole Commission is established by a preponderance of the evidence.* [emphasis added]

This same argument was not only raised by Russo at the District Court level, but also briefed at the appellate level. Therefore, the theory was certainly raised below and briefed on appeal and should have been determined. Russo moved for rehearing on this ground, but it was denied. In any event, it clearly has been the focus of Russo's argument throughout his case and should be considered here.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

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December 24, 1987

Appendix A

Not For Publication

In the United States Court of Appeals
For the Ninth Circuit

CA No. 86-2579
DC No. 86-0854-EFL

Guerino Russo,
Plaintiff-Appellant,

vs.

United States of America,
Defendant-Appellee.

MEMORANDUM*

[Filed July 22, 1987]

Appeal from the United States District Court
for the Northern District of California
Honorable Eugene F. Lynch, District Judge, Presiding
Argued and Submitted May 13, 1987—San Francisco, CA

Before: Sneed, Alarcon and Canby, Circuit Judges.

Guerino Russo appeals the district court's dismissal of his Federal Tort Claims Act (FTCA) suit.[1] The question presented is whether the United States Parole Commission's decision not to provide Russo with a hearing to challenge information used in his parole determination is protected by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a).[2] We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[1] When a court determines that the United States is immune from liability under the FTCA, the proper disposition is a dismissal for lack of subject matter jurisdiction, not a grant of summary judgment. *See Broudy v. United States*, 661 F.2d 125, 128 n. 5 (9th Cir. 1981).

[2] During oral argument, Russo's counsel raised a second issue: whether the Commission failed to fulfill a nondiscretionary duty under

The discretionary function exception excludes from the FTCA's ambit "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The purpose of the exception is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). "[I]f judicial review would encroach upon this type of balancing done by an agency, then the exception would apply." *Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985).

We review *de novo* the district court's determination that government conduct falls within the discretionary function exception. *See Chamberlin v. Isen*, 779 F.2d 522, 523 (9th Cir. 1985).

Russo argues that the dispute resolution provisions of 28 C.F.R. § 2.19[3] imply that the Parole Commission has a nondiscretionary duty to grant hearings to prisoners who dispute information used in the parole decision. We disagree. 28 C.F.R. § 2.19(c) specifies a standard of review, not a procedure for resolving disputes about

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28 C.F.R. § 2.19 to resolve Russo's dispute by the preponderance of the evidence standard. After reviewing the record, we conclude that Russo did not present this theory in district court, and we accordingly decline to address it. *See United States v. Munoz*, 746 F.2d 1389 (9th Cir. 1984).

[3] 28 C.F.R. § 2.19(c) provides in pertinent part:

> The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability.

the evidence. Given the lack of explicit statutory or regulatory language, and given the broad discretion vested in the Commission by 18 U.S.C. § 4218(d), we think it is clear that the decision whether to grant a hearing falls within the Commission's discretion and thus within the discretionary function exception to the FTCA. We therefore affirm the district court's dismissal of this action.

AFFIRMED.

Appendix B

United States District Court
Northern District of California

No. C-86-0854-EFL

Guerino Russo,
Plaintiff,

vs.

United States of America,
Defendant.

JUDGMENT

[Filed Aug. 18, 1986]

[Entered in Civil Docket Aug. 20, 1986]

This matter having come before the Court on July 25, 1986 and the Court having considered the pleadings on file and the arguments of counsel;

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Defendant's motion to dismiss/for summary judgment is granted;

2. Judgment in favor of the defendants and against the plaintiff will be entered accordingly; and

3. The parties will bear their own costs.

IT IS SO ORDERED.

DATED: Aug. 15, 1986.

/s/ EUGENE F. LYNCH
United States District Judge

Appendix C

In the United States Court of Appeals
for the Ninth Circuit

CA No. 86-2579
DC No. 86-0854

Guerino Russo,
Appellant,

vs.

United States of America,
Appellee.

ORDER

[Filed Sept. 25, 1987]

Before: Sneed, Alacron and Canby, Circuit Judges.

The petition for rehearing is DENIED.

Appendix D

United States District Court
Northern District of California

No. C-86-0854-EFL

Guerino Russo,
Plaintiff,

vs.

United States of America,
Defendant.

ORDER OF DISMISSAL

[Filed Aug. 18, 1986]

[Entered in Civil Docket Aug. 20, 1986]

On September 12, 1980 plaintiff plead guilty to charges of receiving and conspiring to receive stolen government property. He was sentenced to concurrent terms of five and seven years. He was paroled in May 1984.

In his complaint, the plaintiff alleged that the United States Parole Commission "falsely imprisoned" him by not having held a hearing and paroled him by February 28, 1982. Plaintiff brought this action for damages against the defendant under the Federal Tort Claims Act, 28 U.S.C. sections 2670-80 ("FTCA"). Defendant United States moved to dismiss or, in the alternative, for summary judgment on the grounds that the action was barred and that it was immune from liability under the "discretionary function" and "false imprisonment" exemptions to the FTCA. 28 U.S.C. sec. 2680(a) & (h).

This matter having come before the Court on July 25, 1986 and the Court having considered the pleadings on file and the arguments of counsel, the Court finds that the alleged conduct of which plaintiff complains is subject to the discretionary function exemption to the FTCA, 28 U.S.C. sec. 2680(a), that the defendant is immune from liability under that exemption and that the action is therefore barred. Since the Court finds that the action is barred by section 2680(a), it does not reach defendant's

motion under the "false imprisonment" exemption to the FTCA, section 2680(h).

Good cause appearing therefore, it is hereby ordered that defendant's motion to dismiss/for summary judgment is granted and the action is dismissed with prejudice.

IT IS SO ORDERED.

DATED: Aug. 15, 1986.

/s/ EUGENE F. LYNCH
United States District Judge

Appendix E

In the United States District Court
for the Northern District of California

Civil action number C-86-0854-EFL

Guerino Russo,
Plaintiff,

vs.

United States of America,
Defendant.

PLAINTIFF'S FIRST AMENDED COMPLAINT
(Rule 15 a)

[Filed July 21, 1986]

FIRST CAUSE OF ACTION
(False Imprisonment)

1. This action arises under the Federal Tort Claims Act, 28 U.S.C. sections 1346(b), 2671 et seq., as hereinafter more fully appears. Before this action was instituted, the claim set forth herein was presented to, and denied by the United States Parole Commission on November 8, 1985, and this suit was commenced within six months of the denial of said claim.

2. Plaintiff, GUERINO RUSSO, resides at 1295 143rd Avenue, San Leandro, California, within the jurisdiction of this Court.

3. On September 12, 1980, plaintiff entered a plea of quilty to charges of receiving stolen government property and conspiracy to receive stolen property. Plaintiff was sentence concurrent terms of five and seven years. Plaintiff began serving his sentence on October 31, 1980 and was ultimately assigned to the Federal Prison Camp at Lompoc, California. Thereafter the United States Parole Commission placed plaintiff "above the guidelines" for purposes of establishing a parole release date and further determined that plaintiff should be confined until the end of his term. The decision by the Parole Commission for fixing the release on parole was based upon false information which was disputed by plaintiff. Pursuant to the *Code of Federal Regulations,* section 28

CFR 2:19 if a prisoner disputes the information relied upon by the Commission for purposes of establishing a parole release date, the Parole Commission shall order a hearing wherein the accuracy of said information must be proven by the preponderance of the evidence. Plaintiff made requests to the Parole Commission for hearings as provided by 28 CFT 2:19. Said commission refused to order such hearings stating that the practice of the Parole Commission was to order such hearings only in cases of parole revocation. On February 10, 1984, plaintiff petitioned for a Writ of Habeas Corpus on the grounds that he was being unlawfully detained due the fact that the United States Parole Commission had failed to follow its own rules in fixing his parole date. Before the respondent answered the petition, the Parole Commission ordered a special hearing. On May 3, 1984, a parole hearing was held at which time plaintiff presented evidence concerning the disputed information. At the conclusion of plaintiff's presentation, the examiners found that plaintiff was correct and that a range of 14-16 months to be served before release was warranted. At this point plaintiff had veen incarcerated for 42 months and was ordered to be released forthwith. Had the Parole Commission followed its own rules, plaintiff would have been paroled not later than February 28, 1982. He was released on May 11, 1984.

4. At all times mentioned herein, the members and employees of the United States Parole Commission, an agency of the United States of America, were acting within the scope of their agency and/or employment.

5. The defendant, without legal justification but with intent to confine plaintiff within boundaries fixed by defendant and by physical means and/or by threats of force, acted to unlawfully restrain plaintiff's liberty. At all times relevant herein plaintiff was aware of his unlawful imprisonment and said confinement was against his will.

6. As a result of and proximate cause of the unlawful conduct of the defendant in refusing to follow its own mandatory rules and regulations, plaintiff was falsely imprisoned for a period of 2 years and 72 days. Plaintiff was required to employ another to manage his business, was prevented from operating his business, and has suffered pain of mind and body in the sum of $4,176,000.00.

7. If the defendant were a private person, it would be liable to plaintiff in accordance with the laws of the State of California.

SECOND CAUSE OF ACTION
(Negligence Per Se')

8. Plaintiff realleges the allegations contained in paragraphs 1 through 7 as though fully set forth herein and further alleges as follows:

9. The rules and regulations established by the United States Parole Commission, including 28 CFR 2.19, were promulgated for the protection of those persons incarcerated in the Federal Correctional Facilities, including plaintiff herein. In particular, 28 CFR 2.19 was and is intended to prohibit the Parole Commission from denying parole based upon information which is disputed by a prisoner unless said prisoner is allowed to respond to the disputed information and the accuracy of the information relied upon by the Parole Commission is established by the preponderance of the evidence.

10. By virtue of the Parole Commission's refusal to allow plaintiff to respond to information which was relied upon by said Commission to deny plaintiff's release on Parole and by virtue of the Parole Commission's refusal to establish the accuracy of the disputed information by the preponderance of the evidence, the Parole Commission violated a statute intended for the protection of plaintiff. Such acts by the defendant, if performed by a private person, would constitute negligence per se' in the State of California.

11. As a result of and proximate cause of the negligence of the Parole Commission in its violation of its own mandatory rules and regulations, plaintiff was improperly denied parole for a period of 2 years and 72 days. Plaintiff was required to employ another to manage his business, was prevented from operating his business, and has suffered pain of mind and body in the sum of $4,176,000.00.

WHEREFORE: plaintiff demands judgment against the defendant for the sum of $4,176,000.00 and costs.

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